CONCLUSIVENESS OF DECREES OF A DOMESTIC PROBATE COURT IN MASSACHUSETTS.

IT has often been asserted that a probate court is in the nature of things an inferior court. Chief Justice Redfield said in his criticism of the decision of the New York Court of Appeals in Roderigas *v.* East River Savings Institution: "There is no controversy, we believe, or has been none hitherto, that courts of probate, whose jurisdiction is created and defined by statute, for the settlement of estates, within particular defined districts, must be regarded both as inferior courts and of special and limited jurisdiction, and that no presumption could be made in favor of their jurisdiction beyond what appeared on the face of their proceedings, and that even where that appeared regular, it might be contradicted in any collateral proceeding, and the whole action of the court rendered nugatory and void for all purposes."[1]

The probate court in Massachusetts is not a court of statutory origin. By the Province Charter of 1691, jurisdiction in probate matters was vested in the governor and council, who exercised it according to the course of the ecclesiastical law, within the several counties, through a surrogate appointed by them and styled Judge of the Probate of Wills and the Granting of Letters of Administration. To these probate courts thus constituted in the several counties the provincial legislatures from time to time annexed jurisdiction in other matters, over which they were, or were assumed to be, by the charter competent to legislate. Upon the adoption of the State constitution, the probate court so constituted originally, and with jurisdiction so extended to new matters, was recognized as an existing institution of the State to be continued.[2] In Peters *v.* Peters,[3] in which it was argued that *certiorari* would not lie to a probate court, Chief Justice Shaw said: "It is urged

[1] 75 A. L. Reg. N. S. 213; see also 3 Redfield on Wills, 58; to the same effect, Fowle *v.* Coe, 63 Me., at p. 248.

[2] Fuller's Probate Laws, 346, and authorities there cited.

[3] 8 Cush. 538.

as a consideration lying at the foundation of this argument, that a court of probate is a judicial court of inferior jurisdiction, a proposition which we think may well be called in question, regarding it in the sense in which it is used in the argument. In the relation which a court of original jurisdiction bears to an appellate court it is inferior and subordinate to this court as the Supreme Court of Probate. . . . But in our view the court of probate, like the ecclesiastical courts of Great Britain, to which it has constant reference, is a court of peculiar jurisdiction, having a separate and exclusive jurisdiction over an important class of subjects, particularly wills, administration, and the settlements of the estates of deceased persons." Beyond this, there is no case in which it has been held to be an inferior court. As to some matters its jurisdiction is special; but this is true of all our courts.

There is a probate court for each county in the Commonwealth. Each of these courts is now technically a court of record, and has original jurisdiction in the county for which it is constituted " of the probate of wills, of granting administration of the estates of persons who at the time of their decease were inhabitants of or resident in the county, and of persons who die out of the Commonwealth leaving estates to be administered within the county; of the appointment of guardians of minors; of all matters relating to the estates of such deceased persons and wards; of petitions for the adoption of children and for the change of names; and of such other matters as have been or may be placed within their jurisdiction by law.[1]

The court has original jurisdiction in equity of all cases and matters relating to the administration of estates of deceased persons, or to wills or trusts created by will, and in the exercise of such equity jurisdiction is expressly declared by statute to be a superior court.[2] It would seem to be a necessary consequence of making the court superior on its equity side, that it is superior on its probate side; for if its decrees in the exercise of the latter jurisdiction may be collaterally attacked, a similar attack may be made on decrees passed in the exercise of the former jurisdiction, inasmuch as it can only act on the equity side as to estates of which it has jurisdiction on the probate side. It would therefore seem to be necessary, in order to give effect to the declaration of the statute, to hold that the court is as to all matters

[1] Pub. Sts. c. 156, § 2.

[2] St. 1891, c. 415.

a superior court. Proceeding according to the course of the ecclesiastical law, its jurisdiction within its territorial boundaries over the estates of decedents is practically unlimited, the sole limitation being the exclusion of estates within the county belonging to decedents whose domicile was in some other county of the Commonwealth. This limitation is practically unimportant, and no more extensive in its nature than that attached to the jurisdiction of the ancient superior courts of Westminster. On principle, therefore, it is submitted, the probate courts of Massachusetts are courts of superior jurisdiction.[1]

Still, it has been decided that, while the decrees of probate courts made in the exercise of their jurisdiction are conclusive upon the common-law courts,[2] and cannot be reversed by writ of error or *certiorari*, nor set aside in equity, even for fraud,[3] there is no presumption in favor of jurisdiction beyond what appears by the record, and jurisdictional fact appearing on the record may be collaterally assailed. In the latter respect the decrees of the probate court are accorded less credit than the judgments of a justice of the peace or of a board of health.[4] As to the lack of presumption in support of the record, it has been held that the decree of a probate court granting letters of guardianship over an insane person is void, unless it appears by the record that notice was given the subject of the decree, and that an adjudication of his insanity was made.[5] A decree of partition is void if the record does not disclose notice to or appearance by an interested party.[6] A decree of partition is also void when it does not appear thereby

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[1] It may be added that probate courts of other States with no greater extent of jurisdiction than those of this Commonwealth have been held to be superior courts. Grignon *v.* Astor, 2 Har. 319, 341; McNitt *v.* Turner, 16 Wall. 352, 366; Comett *v.* Williams, 20 Wall. 226, 249; Veachy *v.* Rice, 131 U. S. 298; Davis *v.* Hudson, 29 Minn. 27; Plume *v.* Howard Savings Bank, 146 N. J. L. 211; The People *v.* Gray, 72 Ill. 343; Grier *v.* Hunt, 6 Humph. (Tenn.) 131; Kimball *v.* Fisk, 39 N. H. 110.

[2] Brown *v.* Wood, 17 Mass. 68; Litchfield *v.* Cudworth, 15 Pick. 30; Bassett *v.* Crafts, 129 Mass. 513; McKim *v.* Doane, 137 Mass. 195; Pierce *v.* Prescott, 128 Mass. 140; Loring *v.* Stedman, 1 Met. 207.

[3] Waters *v.* Stickney, 12 Allen, at p. 3.

[4] Foley *v.* Haverhill, 144 Mass. 353; Hall *v.* Staples, 166 Mass. 402.

[5] Chase *v.* Hathaway, 14 Mass. 222; Wait *v.* Maxwell, 5 Pick. 219; Hathaway *v.* Clark, 5 Pick. 490; Allis *v.* Morton, 4 Gray, 63; Conkey *v.* Kingman, 24 Pick. 118. In the latter case, the letter of guardianship was held to be *prima facie* evidence of the appointment of the guardian, but the invalidity of the appointment was established by the silence of the record as to notice and the insanity of the ward.

[6] Smith *v.* Rice, 11 Mass. 507.

that a sum of money awarded by the commissioners to make the partition just and equal has been secured.[1]

As to contradicting collaterally jurisdictional facts set out in the record, the cases are as follows: It may be shown that a grant of administration was made more than twenty years after the death of the intestate, in contravention of the statute. "When the question," said Parsons, Ch. J., "is whether the court of probate has jurisdiction of the subject or not, he must decide it, but at his own peril. If he errs by assuming a jurisdiction which does not belong to the probate court, his acts are void."[2] It was early held that a decree of administration setting forth that the intestate was domiciled at the time of his death in the county for which the court making the decree was constituted, might be collaterally avoided by proof that the domicile of the intestate was in some other county. This led to the statutory provision that "the jurisdiction assumed in any case by the court, so far as it depends upon the place of residence of a person, shall not be contested in any suit or proceeding, except in an appeal in the original case, or when the want of jurisdiction appears on the same record."[3] The statute, however, does not extend to cases in which jurisdiction depends upon the existence of assets of the deceased within the county.[4] A decree adjudging the personal property of a decedent to be insufficient to pay debts, and authorizing a sale of the real estate for that purpose, may be collaterally attacked on the ground that there were no unpaid debts for payment of which the real estate was subject to be sold.[5]

A decree granting letters of administration is *prima facie* evi-

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[1] Thayer *v.* Thayer, 7 Pick. 209; Jenks *v.* Howland, 3 Gray, 536. In Chase *v.* Hathaway, 14 Mass. 227, Chief Justice Parker, speaking of the importance of preserving full records of notice and other proceedings in the probate office, said: "It is all the more important, as any material defect will render the proceedings null, at any period, when they shall be brought in question."

[2] Wales *v.* Willard, 2 Mass. 124.

[3] Cutts *v.* Haskins, 9 Mass. 543; Holyoke *v.* Haskins, 5 Pick. 20; Holyoke *v.* Haskins, 9 Pick. 259; Rev. Sts. c. 83, § 12.

[4] Harrington *v.* Brown, 5 Pick. 519.

[5] Heath *v.* Wells, 5 Pick. 139; Lawson *v.* Smith, 4 Allen, 359; Aiken *v.* Morse, 104 Mass. 277; Tarbell *v.* Parker, 106 Mass. 347. But see now St. 1874, c. 346, § 2. These cases may be supported on another ground, namely, that if the real estate is freed from the lien of the creditors, the title is absolutely in the heirs, and the court has no more authority to decree its sale than it has to order the sale of land of a stranger. See Conrad *v.* Wapples, 96 U. S. 279; Risley *v.* Phœnix Bank, 83 N. Y. 318.

dence only of jurisdictional facts.[1] The probate court has jurisdiction to set out an estate of homestead in cases where the right to it is not disputed by the heirs or devisees. A decree setting out such an estate may be avoided by plea and proof that the right was disputed. "We understand the principle to be well settled," said Dewey, J., "that if the probate court exceeds its jurisdiction, and makes a decree upon a matter in which it has no jurisdiction, such decree is held utterly and absolutely void and of no effect, and may be so treated in any collateral proceeding, if such want of jurisdiction is shown."[2] A grant of administration upon the estate of a living person is void.[3] The opinion of the court in so deciding goes upon the ground that the death of the alleged decedent is a jurisdictional fact, the truth of which may be attacked collaterally.[4]

In O'Herron *v.* Gray,[5] one question was as to the validity of a decree of a probate court authorizing the guardian of minors to transfer certain shares of stock. The decree was made on a petition in the name of the guardian, and signed "Catherine O'Herron, Guardian by E. S. Francis." The decree was attacked collaterally on the ground that Francis had no authority from the guardian to petition in her name, and that the proceedings were had without notice to the guardian or the wards, and without their knowledge. In holding the decree to be void, Mr. Justice Knowlton, speaking for the court, said: "But above all, the probate court acquired no jurisdiction of the case as against the plaintiffs. No case nor any proper party was ever before the court in regard to the sale of the stock. The unauthorized signature and appearance of Francis availed nothing as against the plaintiffs or their guardian. This conflicts with the established rule in common-law proceedings. Subject to exceptions not material to this point, neither the plaintiff nor the defendant in an action at law can collaterally attack the judgment rendered therein, on the ground that the proceedings were begun or defended without authority from or notice to him."[6] It is

[1] Pinney *v.* McGregory, 102 Mass. 186; Crosby *v.* Leavitt, 4 Allen, 410; Harrington *v.* Brown, 5 Pick. 519; Day *v.* Floyd, 130 Mass. 488; Newman *v.* Jenkins, 10 Pick. 515.

[2] Mercier *v.* Chace, 9 Allen, 242; Woodward *v.* Lincoln, 9 Allen, 239.

[3] Jochumsen *v.* Suffolk Savings Bank, 3 Allen, 87.

[4] The true ground is want of due process of law. In such a case it appears on the face of the proceedings that the supposed decedent was not made a party, that they were had between other parties, and from their nature did not contemplate notice to him, and that there was no seizure of the estate antecedent to the decree which would operate as notice. Scott *v.* McNeal, 154 U. S. 34.

[5] 168 Mass. 573.

[6] Finneran *v.* Leonard, 7 Allen, 54; Hendricks *v.* Whittemore, 105 Mass. 24.

true that the decision is on an agreed statement of facts, the effect of which was to waive the right if such existed, to insist on the conclusiveness of the decree of the probate court; [1] but this is not alluded to in the opinion, and apparently it was intended to accept the doctrine that the probate court is not competent to settle any collateral fact of a jurisdictional nature.[2]

It thus appears that the common law of England as to the conclusiveness of judgments of inferio. courts involving a question of jurisdiction has been applied in all its severity to the decrees of the Massachusetts courts of probate, although they clearly are not in the technical sense inferior courts. The reason for this is similar to that given by Lord Coke for refusing to accord credit to the decrees of the Court of Chancery proceeding according to the course of equity; namely, that "no writ of error, but an appeal to certain delegates, doth lie." "No writ of error lies to the probate court," said Jackson, J., in Smith *v.* Rice.[3] "Their proceedings not being according to the course of the common law, a party situated like the present demandant has no means of revising the decree, and causing it to be annulled or reversed, so as to prevent its being produced against him in another cause. He has then a right, when it is so produced, to aver and prove its nullity."[4] "The cases all assume," said Shaw, Ch. J., in Peters *v.* Peters,[5] "that a decree, which in other courts would be voidable, shall be held wholly void, because it cannot be re-examined and reversed in a common-law court, by a common-law process, but only in the Supreme Court of Probate on appeal." There appeared to be no adequate way of correcting errors and superseding erroneous decrees. "One of the strong reasons for holding the question of jurisdiction not concluded," said Dewey, J., in Jochumsen *v.* Suffolk Savings Bank,[6] "is that the only opportunity for reversing or modifying a decree of the court of probate is the limited one of

[1] See Sykes *v.* Keating, 118 Mass., at p. 520.

[2] Other probate cases holding decrees void fall within the rule applicable to the judgments of all courts, that when want or excess of jurisdiction appears affirmatively by the record, the proceedings are void. Hunt *v.* Hapgood, 4 Mass. 117; Sumner *v.* Parker, 7 Mass. 79; Dawes *v.* Head, 3 Pick. 142; Hancock *v.* Hubbard, 19 Pick. 167; Cowdin *v.* Perry, 11 Pick. 51; Verry *v.* McClenner, 6 Gray, 535; Harmon *v.* Day, 105 Mass. 33; Conant *v.* Newton, 126 Mass. 105; Brown *v.* Doolittle, 151 Mass. 595; Newell *v.* Peaslee, 151 Mass. 601; Thayer *v.* Winchester, 133 Mass. 447.

[3] 11 Mass. 513.

[4] *Certiorari* will not lie. Peters *v.* Peters, 8 Cush. 544.

[5] 8 Cush. 544.

[6] 3 Allen, 95.

an appeal to be taken within thirty days after the same is made, or where, through mistake, the party has omitted to do so, and this court, upon petition and cause shown, allows the appeal to be entered within one year."

This reason disappeared in the light of the decision made in 1865 in Waters *v.* Stickney,[1] where it was held that the probate court has power to "correct errors arising out of fraud or mistake in its own decrees." "This power," said Chief Justice Gray, in the case cited, "by enabling a court of probate to correct mistakes and supply defects in its own decrees, better entitles them to be conclusive upon other courts." A party injured by a decree of a probate court has opportunity in a proper case, at any time, to cause the decree to be annulled or revoked, so as to prevent its being employed against him. He may apply to the probate court, and if his application is refused, may appeal to the justices of the Supreme Judicial Court sitting as the Supreme Court of Probate. This remedy is as ample as that of a writ of error. Accordingly there would appear to be no longer any ground for holding that the conclusiveness of the decrees of a probate court involving a question of jurisdiction is to be tested by the common law of England applicable to the judgments of an inferior court. And it may be observed that, inasmuch as the decrees of the courts of probate involve to a very great extent questions of title, the considerations of policy which exempt the judgments of superior courts of common-law jurisdiction from collateral attack, within the bounds which have been indicated, more imperatively require the same exemption in the case of the decrees of the probate courts. Yet as late as 1890 Mr. Justice William Allen said, in Brown *v.* Doolittle,[2] "Error does not lie to the court of probate, and when its decree is erroneous, it may not only be collaterally impeached by plea and proof, but it will be set aside by the court on the application of a person interested in the estate, and injuriously affected by the decree."

All our courts subordinate to the court of last resort are now, it would appear, in effect, on the same footing with respect to direct attack upon their judgments and decrees. On writ of error to courts both of general and of limited jurisdiction, proceeding according to the course of the common law, errors of fact going to

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[1] 12 Allen, 1; Gale *v.* Nickerson, 144 Mass. 415.

[2] 151 Mass. 600.

the jurisdiction may under our statutes be assigned.[1] On *certiorari* to a court exercising a special authority, questions of jurisdiction may be tried.[2] On bill or petition, jurisdictional findings by courts proceeding in equity or in probate causes may finally be reversed, in the one case by the Supreme Judicial Court on its equity side, in the other by the Supreme Court of Probate. The general rule that a judgment of a domestic court proceeding according to the course of the common law cannot be impeached collaterally by parties or privies for want of jurisdiction of the person, is expressly put upon the ground that the remedy by writ of error is more appropriate.[3] On the same ground, it must be generally true that the judgment of such a court is not collaterally assailable for want of jurisdiction of the cause unless the defect appears on the face of the record. And there is no apparent reason why the same exemption from collateral attack should not attach to the judgments and decrees of courts proceeding otherwise than according to the course of the common law, inasmuch as the errors of such courts may be corrected by direct process as far reaching as a writ of error.[3]

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[1] Pub. Sts. c. 187, § 3. But if the attacking party has had notice of the original action, and the jurisdictional fact disputed was or might have been tried therein, he cannot raise the question on writ of error. Raymond *v.* Butterworth, 139 Mass. 471. The principle of this, it is apprehended, applies in *certiorari*, and also, except where fraud is alleged, to an application to a court of equity or of probate to revoke its decree.

[2] Heyward, Petr., 10 Pick. 358; *Ex parte* Mayor of Albany, 23 Wend. 277; Whitney *v.* Board of Delegates, 14 Cal. 479.

[3] Hendrick *v.* Whittemore, 105 Mass. 34.